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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

ADRIAN FOSTER,

Defendant and Appellant.

A152746

(Solano County
Super. Ct. No. FCR319708)

MEMORANDUM OPINION¹

After a jury found him guilty of possession of ammunition by a felon, possession of a concealed firearm, and misdemeanor possession of marijuana for sale, this is Adrian Foster's second appeal from the ensuing conviction and sentence. In the first appeal, which we resolved in an unpublished opinion filed January 16, 2019, we affirmed the conviction, but struck an on-bail enhancement finding, vacated the sentence, and remanded for the trial court to take an admission or denial of the enhancement personally from Foster. (*People v. Foster* (Jan. 16, 2019, A151066) [nonpub. opn.].)

Foster now seeks review of the trial court's post-judgment denial of his pro se motion to strike a \$6,000 restitution fine imposed on him under Penal Code section 1202.4. After obtaining a certificate of appealability, Foster filed this second appeal in

¹ We resolve this case by memorandum opinion pursuant to California Standards of Judicial Administration, section 8.1. (See also *People v. Garcia* (2002) 97 Cal.App.4th 847, 853–855.)

which his counsel has reported finding no arguable issues and asked us to conduct an independent review of the record under *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738. Counsel has also advised Foster of his right to file a supplemental brief, which he has not done.

Having conducted the required independent review, we see no issues that warrant further briefing. Foster did not object to imposition of the restitution fee at sentencing. In support of his post-judgment motion, Foster cited Penal Code section 1205, subdivision (a). He also argued that the \$6,000 restitution fine is not supported by sufficient evidence in the record of his ability to pay.

Penal Code section 1205, subdivision (a), on its face, is inapplicable. As for the issue of ability to pay, Penal Code section 1202.4 permits a sentencing court to waive imposition of a restitution fine if it finds “compelling and extraordinary reasons” why the fine should not be imposed. But the statute expressly states that inability to pay the fine does not qualify: “A defendant’s inability to pay shall not be considered a compelling and extraordinary reason not to impose a restitution fine.” (Pen. Code, § 1202.4, subd. (c).)

Although the recent opinion in *People v. Dueñas* (2019) 30 Cal.App.5th 1157, casts some doubt on whether Penal Code section 1202.4, subdivision (c) may be applied to an indigent defendant consistent with due process principles, that issue was forfeited on this record. A trial court has no sua sponte duty to make an ability to pay determination before imposing a restitution fine under Penal Code section 1202.4, subdivision (c). (See *People v. McMahan* (1992) 3 Cal.App.4th 740, 749 [“even if the court were required to initially determine the defendant’s ability to pay, his failure to object or present contrary evidence waived the right to complain on appeal”].)

DISPOSITION

The trial court’s order denying Foster’s motion to strike the \$6,000 restitution fee imposed on him at sentencing is affirmed.

Streeter, Acting P.J.

We concur:

Tucher, J.

Brown, J.

152746/*People v. Foster*